

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENNIS FRAZIER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUL 24 1968

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APPELLANT'S REPLY BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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363 F.2d 169 (9th Cir. 1966)

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269 F.2d 217 (D.C.Cir. 1959)

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340 US 42 (1950)

Constitution

United States Constitution:

Fifth Amendment

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#7011



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TO THE CHIEF JUSTICE OF THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT, AND TO THE ASSOCIATE JUSTICES  
THEREOF, AND TO EACH OF THEM:

Appellant herein replies to the argument presented  
in appellee's brief:

I

ARGUMENT

A.

- (1) re APPELLANT'S PRIVILEGE AGAINST  
SELF INCRIMINATION VIOLATED BY  
REASON OF HIS CONVICTION FOR FAILURE  
TO COMPLY WITH THE REQUIREMENTS OF  
THE MARIHUANA TAX SYSTEM.

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Appellee has chosen to answer this argument lengthily  
(the brief is well over the maximum 20 pages) and authorita-  
tively, quoting cases decided in 1919, 1928, 1950, and 1959,<sup>1/</sup>

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<sup>1/</sup> U.S.v Doremus, 249 US 86(1919); Nigro v US, 276 US 332(1928);  
U.S.v Sanchez, 340 US 42(1950; Smith v.US, 269F2d 217(1959).



and stating in the opening paragraph of his brief (at page 8) that "The defendant is relying almost entirely on three recent Supreme Court decisions:

Marchetti v. United States, 390 U.S. 39 (1968);

Grosso v. United States, 390 U.S. 62 (1968);

Haynes v. United States, 390 U. S. 85 (1968)."

The defendant certainly is relying on these three recent Supreme Court decisions just quoted, and appellee's argument, with authorities cited long before these three cases were decided on January 29, 1968, is of no avail.

A careful reading of Marchetti, Grosso and Haynes shows the error in appellee's argument. For example, Marchetti, 19 L ed 2d 889, 895, states:

"The issue before us is not whether the United States may tax activities which a State or Congress has declared unlawful. The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation, and nothing that follows is intended to limit or diminish the vitality of those cases.

"The issue is instead whether the methods employed by Congress in the federal wagering tax statutes are, in this situation, consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment."



And from Marchetti at page 903:

"The Constitution of course obliges this this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise.

"But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers."

Appellee argues that the defendant does not come under the registration requirements. But the Act has taken care of that by Title 26 USC #7011, as noted by Chief Justice Warren in Grosso, 19 L ed 2d 906, 921, in the only dissent among the nine Justices:

"...#7011 imposes a general registration requirement on all those liable for other special taxes."

It is to be noted that Exhibit One, attached to appellant's opening brief, proves in the letter to defendant from the Internal Revenue Service, that he is being penalized because "you are not registered under the Marihuana Tax Act".

And at page 904 of Marchetti, the Court further clarifies the real issue involved:

"The terms of the wagering tax system make quite plain that Congress intended information obtained as a consequence of registration and payment of the occupational tax to be provided to interested prosecuting authorities."



And at page 905, Marchetti:

"Nonetheless, we can only conclude, under the wagering tax system as presently written, that petitioner properly asserted the privilege against self-incrimination, and that his assertion should have provided a complete defense to this prosecution."

"We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements."

Appellee argues further that defendant's case is distinguishable from Marchetti, Grosso and Haynes, in that appellant failed to perform a statutory duty to refrain from transferring marihuana except in pursuance of a written order, and for this failure he became liable for conviction and punishment. There is no difference. Marchetti, Grosso, and Haynes also failed to perform a statutory duty, and for this failure were convicted.

Appellee refuses to incorporate into his logic that had the appellant performed that statutory duty and acquired the form, he would have been required to disclose information which would then be made available to law enforcement.

This is the ISSUE and the DECISION in Marchetti, Grosso, and Haynes - that where Congress has seen fit to tax an illegal



activity in any area permeated with criminal statutes, that the taxing may be permissible, but that the requirement of disclosure of any incriminating information which is then made available to law enforcement cannot be the basis of a conviction if the person properly raises his privilege against self-incrimination.

Appellant herein has raised his privilege against self-incrimination. The taxing system as enacted under the Marihuana Tax Act is in an area permeated with criminal statutes, and under the authority of Marchetti, Grosso and Haynes, appellant's conviction for non-compliance of a statute which would have forced disclosure of incriminating information available to law enforcement cannot stand.

(2) re NECESSITY TO CONSIDER THE  
VALIDITY OF THE CONVICTION AS  
TO COUNT THREE.

---

Appellee concedes that the conviction under Count Three might be determined invalid, then cites authorities which state a reversal is not necessary if defendant is validly convicted on counts other than the one in question, if sentences are concurrent.

Not necessary to reverse, true; however, the rulings do not say the counts cannot be reversed. The Court is empowered to reverse, particularly if it is determined that the weight of the testimony anent Count Three unduly prejudiced the jury's determinations on Counts One and Two.



B. re CONVICTION OBTAINED BY  
IMPERMISSIBLE ENTRAPMENT.

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Appellant's opening brief stated in authoritative detail the argument re impermissible entrapment.

Appellee has seen fit to state his opinion as to the facts.

Appellee consistently accuses appellant of having "no authority", yet appellee makes statements such as:

...(at page 22)..."it is clear that the report reflects merely a typographical error", but there was no evidence introduced that it was a typographical error; appellee merely states it as a fact.

...(at page 20)..."Knapp then asked the defendant for his phone number which the defendant wrote down and gave to Knapp", yet there was no introduction into evidence of this vital piece of paper with defendant's handwriting thereon with an expert to prove same; appellee merely states it as a fact.

...(again, at page 20)..."defendant complained that he did not make enough money from the transaction and was unhappy with the amount he received", yet there was no evidence of any kind that the defendant received any money.

...(and at page 21)..."no evidence to indicate that defendant's car had a flat tire", appellee thus ignoring Agent Henry's testimony (T.92-93) that he observed



defendant pick up a tire and return to his car with that tire.

Appellant thus justifiably relies on the argument as presented in his opening brief, with the authorities cited, without repetition of same herein.

C.

- (1) re COURT INSTRUCTIONS AS TO  
QUANTUM OF PROOF OF DEFENSE OF  
ILLEGAL ENTRAPMENT.
- 

Appellee states at page 27, "The phrases defendant quotes from the Notaro case appear to refer to the instruction given by the District Court" instead of the ruling as given by the Appellate Court in the matter.

Referral to appellant's opening brief, pages 44-45, will reveal the exact quotations from the Ninth Circuit's appellate ruling in Notaro v. United States, 363 F2d 169 (9th Cir. 1966), complete with page numbers.

Appellant sees no reason to waste the Court's time by repeating same herein.

- (2) re SUBMITTING THE QUESTION OF  
ENTRAPMENT TO THE JURY.
- 

Appellee again uses his favorite expression ("no authority to argue the contention that the question of entrapment is an area for the Court and not the jury.

The authority cited in the opening brief is the NINTH CIRCUIT COURT OF APPEALS, in its opinion in ROBISON



V. UNITED STATES, 379 F2d 338 (9th Cir.1967), which stated clearly, succinctly, and certainly that the Court would readily certify to the (United States Supreme) Court the question whether the issue of entrapment should not always be decided by the court and never submitted to the jury, were the question RES INTEGRA.

Thus, the issue was made RES INTEGRA in appellant's opening brief, and it is upon this authority in Robison that appellant asks the Ninth Circuit Court to consider same.

D. re UNREASONABLE PRE-ARREST DELAY AS  
VIOLATION OF APPELLANT'S CONSTITUTIONAL  
RIGHTS.

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Appellee demonstrates again the capacity to miss the point of the argument.

Authorities cited in appellant's opening brief prove that the amount of time elapsed is NOT the issue to be considered, but rather whether or not it is shown that, regardless of time, defendant suffered prejudice to the extent of being unable to properly defend himself.

Appellant has stated ample authority in his opening brief so that further citations herein would be repetitious and time-consuming for this Court.



CONCLUSION

For the reasons stated in appellant's opening brief, and the additional reasons stated herein, it is respectfully submitted that the judgments of conviction on three counts of appellant Dennis Frazier be reversed, remanded, or dismissed as indicated in the opening brief.

Respectfully submitted,

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